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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 756

McGREW PAINT AND ASPHALT CO., *Petitioner,*

vs.

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

No. 757

RAILWAY PAINT CO., *Petitioner,*

vs.

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

No. 758

DEDNOX, INC., *Petitioner,*

vs.

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

No. 759

INSUL-MASTIC ROOFING & SIDING CO., *Petitioner,*

vs.

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, McGrew Paint and Asphalt Co., a corporation, Railway Paint Company, a corporation,

Dednox, Inc., a corporation, and Insul-Mastic Roofing & Siding Co., a corporation, respectfully pray for Writs of Certiorari to the Supreme Court of the State of Illinois, to review four several judgments of that Court entered against each of your Petitioners.

Judgments and Application for Writs of Certiorari.

The judgments of the Court (R. 36, 37, 38, 39) were rendered on May 16, 1944. A Petition for Rehearing was filed on June 8, 1944 (R. 40, 41, 42, 43). The Petition for Rehearing was denied on September 18, 1944 (R. 43). This Petition for the issuance of Writs of Certiorari is filed prior to the expiration of three months from September 18, 1944.

Statement of Matters Involved.

The judgment of the Court below involves the validity of Section 2(e)(5) of the Illinois Unemployment Compensation Act (Ill. Rev. Stat. 1943, Chap. 48, par. 218). The case was tried before a representative of the Director of Labor of the State of Illinois, on a stipulation of facts. The stipulation appears of Record pp. 6 to 9. In the Court below the Petitioners at all times claimed that this Section of the Illinois Unemployment Compensation Act violated Section 1 of Article 14 of the Amendments of the United States Constitution (R. 9, 29). The same contention was presented in the Supreme Court of Illinois (R. 29, 35). It was renewed in the Petition for Rehearing (R. 41). The Supreme Court of Illinois held (R. 45) that the Constitutional issues were decided adversely to Petitioners in the case of *Zehender & Factor, Inc.* v. *Murphy*, 386 Ill. 258, and that by authority of that decision the attack upon the validity of Section 2(e)(5) is rejected.

Section 2(e)(5) of the Illinois Unemployment Compen-

sation Act (Ill. Rev. Stat. 1943, Chap. 48, Par. 218) is as follows:

> "Any employing unit which together with one or more other employing units, is owned or controlled, directly or indirectly, by legally enforceable means or otherwise, by the same interests, or which owns or controls one or more employing units directly or indirectly, by legally enforceable means or otherwise, and which if treated as a single unit with such other employing units or interests or both would be an employer under paragraph (1) of this subsection."

The Facts.

There is no dispute as to the facts. The material elements in the case are that a proceeding was commenced against the four Petitioners and also against the Insul-Mastic Laboratories Inc. by the Director of Labor of the State of Illinois, for contributions under the Unemployment Compensation Act. After the Director of Labor had notified them that they were liable the stipulation here referred to was entered into. From the stipulation it appears (R. 7):

> "(2) That said corporations were, from the date of their incorporation and throughout the periods included in the Director's determinations and assessments, controlled either directly or indirectly by legally enforceable means or otherwise by one O. V. McGrew; that each of said corporations, if treated as a single employing unit together with the other corporations had in its employment a sufficient number of persons to constitute it an employer liable for the payment of contributions under Section 2(e)(1) of the Illinois Compensation Act."

and also (R. 7):

> "(3) That none of the corporations from the period of their incorporation throughout the period covered by the Director's determinations and assessments, em-

ployed in their individual corporate capacity a sufficient number of persons so as to become liable for contributions as an employer under the provisions of Section (2)(e)(1)(A) or (2)(e)(1)(B) of the Illinois Unemployment Compensation Act."

Sections 2(e)(1) A and B of the Illinois Unemployment Compensation Act is as follows:

"'Employer' means:

"(1)(A) With respect to the years 1937, 1938 and 1939, any employing unit which has or had in employment eight or more individuals on some portion of a day, but not necessarily simultaneously, and irrespective of whether the same individuals are or were employed on each such day within each of twenty or more calendar weeks, whether or not such weeks are or were consecutive, within either the current or preceding calendar year;

"(B) With respect to the year 1940 and thereafter, any employing unit which has or had in employment six or more individuals, within each of twenty or more calendar weeks (but not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week), whether or not such weeks are or were consecutive within either the current or preceding calendar year."

The Supreme Court of Illinois reversed the *nisi prius* judgment obtained against the Insul-Mastic Laboratories Inc. but sustained the four remaining judgments rendered against these Petitioners.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1926, Section 344, Title 28, U. S. C. A.

Questions Presented.

A. Is Section 2(e)(5) of the Unemployment Compensation Act of the State of Illinois, repugnant to Section 1, Article 14 of the Amendments of the Constitution of the United States, in that said Statute deprives these Petitioners of their property without due process of law and denies them the equal protection of the laws?

That provision of the Section in question under which these Petitioners were held bound provides that they are liable for the payment of contributions if the corporations are composed of employing units, which together with other employing units are owned or controlled by the same interests directly or indirectly **by legally enforceable means or otherwise.** This provision, it is submitted, is unreasonable, arbitrary, contrary to public policy and void.

It is clear from the stipulation (R. 8) *that there are at least ten other shareholders in these corporations, some owning substantial interests in these corporations, aside from O. V. McGrew, who by stipulation was stated to control them all and who owned a majority of the capital stock in each of the four Petitioners now before this Court, and a minority in the Insul-Mastic Laboratories Inc. The stipulation to the effect that O. V. McGrew controlled these corporations does not indicate whether he controlled them legally or illegally. The stipulation in substance follows the words of the Statute to the effect that O. V. McGrew's control of all these corporations was* **by legally enforceable means or otherwise.** *This phrase would cover control by illegal threats or fraudulent and unlawful methods. Such control, if not based upon legally enforceable means, must be temporary in its nature with no standard for its temporal duration. Indeed the moment after the stipulation was submitted it might well be that the control no longer existed.*

The Court below in its opinion omitted to pass on this contention. It simply stated that the validity of Section 2(e)(5) had been sustained in the case of *Zehender & Factor, Inc.* v. *Murphy,* 386 Ill. 258.

An inspection of that case discloses that there also the Court did not consider the phraseology in question but on the contrary discussed Section 2(e)(5) generally and upheld its constitutionality as a whole and in general terms.

A remarkable feature of the Court's opinion in *Zehender & Factor, Inc.* v. *Murphy,* 386 Ill. 258, was that the Court there relied on *Handy & Harmon* v. *Burnet,* 284 U. S. 136. In that case there was before this Court the problem of consolidated returns of affiliated corporations. The Federal Statute, (40 Stat. at L. 1081, Chap. 18, Par. 240(b)) provided that for the purpose of that section two or more domestic corporations shall be deemed to be affiliated if substantially all the stock of two or more corporations is owned or controlled by the same interests. It will be noted that this Statute did not contain the expression "by legally enforceable means or otherwise." The Court said, however, page 140:

> "We assume in favor of petitioner that they, through their power over Hamilton's official position and salary, their ability to dominate both corporations or by other means, were in position effectually to influence him in respect of the voting, use or disposition of the stock issued to him, and thus as a practical matter to exert a kind of control called by counsel 'actual' to distinguish it from a legally enforceable control.
>
> "The purpose of Par. 240 was, by means of consolidated returns, to require taxes to be levied according to the true net income and invested capital resulting from and employed in a single business enterprise even though it was conducted by means of more than one corporation. Subsection (b) clearly reflects the intention, by means of such returns, to secure substantial

equality as between shareholders who ultimately bear the burden. That intention is shown by the legislative history and was given effect by the regulations contemporaneously promulgated. It requires no discussion to show that such returns will not make against inequality or evasion unless the same interests are the beneficial owners in like proportions of substantially all of the stock of each of such corporations. *Alameda Invest. Co.* v. *McLaughlin* (D. C.) 28 F. (2d) 81; *Montana Mercantile Co.* v. *Rasmusson* (D. C.) 28 F. (2d) 916; *Commissioner of Internal Revenue* v. *Adolph Hirsch & Co.* (C. C. A. 2d) 30 F. (2d) 645, 646; *Commissioner of Internal Revenue* v. *City Button Works* (C. C. A. 2d) 49 F. (2d) 705. Affiliation on any other basis would not make against inequality or evasion. It would require very plain language to show that Congress intended to permit consolidated returns to depend on a basis so indefinite and uncertain as control of stock without title, beneficial ownership or legal means to enforce it. Control resting solely on acquiescence, the exigencies of business or other considerations having no binding force is not sufficient to satisfy the statute."

It is clear that while this Court construed the Federal Statute so that its phraseology would envision only legal control, nevertheless, it is also clear from this statement that any other type of control in the opinion of this Court would be indefinite, uncertain and make for inequality.

B. Is the provision as a whole repugnant to Section 1 of Article 14 of the Amendments of the Constitution of the United States?

As the Supreme Court of Illinois has pointed out in the case of *Zehender & Factor, Inc.* v. *Murphy*, 386 Ill. 258, relied upon by the Court in the instant case (R. 35), some states have sustained the validity of similar provisions.

An investigation of the statutory provisions in the various states shows that the legislatures of the majority of the

states have either repealed provisions similar to that contained in Section 2(e)(5) or have never enacted them. These decisions of those states which have supported the constitutionality of these provisions generally indicate quite clearly that there must be something more to affiliate the enterprises sought to be taxed collectively than mere control. Nothing to that effect appears in the statute and nothing to that effect appears in this record.

A similar provision has been held unconstitutional in *Independent Gasoline Co.* v. *Bureau of Unemp. Comp.*, 190 Ga. 613, 10 S. E. (2d) 58, and in *Benner-Coryell Lumber Co.* v. *Indiana Unemployment Comp. Board*, 218 Ind. 20, 29 N. E. (2d) 776.

This Court has denied certiorari in both of these cases (*Bureau of Unemp. Comp., Petitioner* v. *Independent Gasoline Co.*, 311 U. S. 707, and *Indiana Unemployment Comp. Board, Petitioner*, v. *Benner-Coryell Lumber Co.*, 312 U. S. 698).

Reasons for Allowance of Writs.

1. It is undisputed that none of the Petitioners singly is liable for the tax imposed. The only basis for their liability as a group is that they are controlled by legal means *or otherwise* by O. V. McGrew. To subject the Petitioners collectively to a tax (for which admittedly they are not liable individually) because of control by means which may be legally unenforceable is in violation of Section 1, Article 14 of the Amendments of the Constitution of the United States. That portion of the statute which provides for the taxation of a group of employing units collectively where individually none of them would be subject to taxation does not give the taxpayer the equal protection of the laws. If the control is not legally enforceable at any one time it is control at will or aquiescence which may be altered from day to day. If the control is

control by fraud or duress it is equally repugnant to the constitutional proviso and amounts to an arbitrary deprivation of property without due process of law.

2. Even were the control exercised by legally enforceable means the statute complained of is repugnant to the Constitution of the United States for the further reason that it is an arbitrary exercise of the power of taxation against the minority stockholders. It is tantamount to a taking of their property without due process of law and a denial to them of the equal protection of the laws in violation of Section 1 of the 14th Amendment.

WHEREFORE, your Petitioners respectfully pray that Writs of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Illinois, commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings said Supreme Court of Illinois had in said causes to the end that the causes may be reviewed and determined by this Honorable Court, and that said judgments of the Supreme Court of Illinois may be reversed by this Honorable Court, and for such other relief as may be proper.

McGREW PAINT AND ASPHALT CO., a corporation;

RAILWAY PAINT COMPANY, a corporation;

DEDNOX, INC., a corporation, and

INSUL-MASTIC ROOFING & SIDING CO., a corporation,

Petitioners,

By JOSEPH G. SLOTTOW,
CHARLES LEVITON,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion below is reported in 387 Ill. Supreme Court Reports, at page 241.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as Amended by the Act of February 13, 1926, Section 344 Title 28 U. S. C. A.

Petitioners seasonbly have raised the constitutional question to the effect that Section 2(e)(5) of the Illinois Unemployment Compensation Act, (Ill. Rev. Stat. 1943, Chap. 48, par. 218) is repugnant to Section 1 of Article 14 of the Amendments to the United States Constitution (R. 29, 35). This petition for the issuance of the Writs of Certiorari is filed prior to the expiration of three months from September 18, 1944, the date when the Petition for Rehearing in the Supreme Court of Illinois was denied (R. 43).

Statement of the Case.

On January 7, 1942, there was rendered a report of the representative of the Director of Labor of the State of Illinois, finding that on June 5, 1941, these Petitioners, together with Insul-Mastic Laboratories, Inc., were employers liable for the payment of contributions under the Illinois Compensation Act, and that they were assessed thereunder (R. 4, 5, 6). The pertinent portions of the Unemployment Compensation Act have been heretofore set forth in the Petition for Certiorari. The entire Act appears in Illinois Rev. Stat. 1943, Chap. 48, Paragraphs 217-250.

A stipulation was entered into between the Director of

Labor and the Petitioners, pertinent portions of which are as follows (R. 7, 8, 9):

"(2) That said corporations were, from the date of their incorporation and throughout the periods included in the Director's determinations and assessments, controlled either directly or indirectly by legally enforceable means or otherwise by one O. V. McGrew; that each of said corporations, if treated as a single employing unit together with the other corporations had in its employment a sufficient number of persons to constitute it an employer liable for the payment of contributions under Section 2(e)(1) of the Illinois Unemployment Compensation Act.

"(3) That none of the corporations from the period of their incorporation throughout the period covered by the Director's determinations and assessments, employed in their individual corporate capacity a sufficient number of persons so as to become liable for contributions as an employer under the provisions of Section (2)(e)(1)(A) or (2)(e)(1)(B) of the Illinois Unemployment Compensation Act.

"(4) Except for the facts herein contained there is no evidence that any of the above mentioned corporations were incorporated or formed for the purpose of evading the payment of contributions under the Illinois Unemployment Compensation Act, as amended.

"(5) That the amounts set forth under the caption 'Wages Payable' in each and all of the determinations and assessments by the Director of Labor (incorporated in this stipulation by reference and identified as Director's Exhibits No. 3 in each of the above causes) are correct.

"(6) That the shareholders, together with their respective shareholdings or percentage of shareholdings in said corporations, are as follows:

McGrew Paint & Asphalt Co., a corporation

O. V. McGrew, 4998 shares of common stock
V. B. McGrew, 1 share of common stock
Robert E. McComas, 1 share of common stock
Genevieve McGrew, 500 shares of preferred stock

Dednox, Inc., a corporation

O. V. McGrew, 55% of capital stock
Joseph G. Slottow, 25% of capital stock
M. R. Becker, 5% of capital stock
Jay R. Sheesley, 15% of capital stock

Railway Paint Company, a corporation

O. V. McGrew, 55% of capital stock
Joseph G. Slottow, 25% of capital stock
M. R. Becker, 5% of capital stock
Jay R. Sheesley, 15% of capital stock

Insul-Mastic Roofing & Siding Co., a corporation

O. V. McGrew, 547 shares of capital stock
Fred Cox, 350 shares of capital stock
V. B. McGrew, 100 shares of capital stock
G. L. Burton, 1 share of capital stock
H. P. Shane, 1 share of capital stock
J. M. Rusteck, 1 share of capital stock

Insul-Mastic Laboratories, Inc., a corporation

O. V. McGrew, 247 shares of capital stock
Genevieve McGrew, 250 shares of capital stock
V. B. McGrew, 200 shares of capital stock
Fred Cox, 50 shares of capital stock
G. L. Burton, 1 share of capital stock
J. M. Rusteck, 1 share of capital stock
H. P. Shane, 1 share of capital stock
D. Paley, 250 shares of capital stock."

Objections to the report were filed and the Director of Labor overruled and adopted the report of his representative (R. 9-12).

The causes were reviewed by the Circuit Court of Cook County on Certiorari. The reports were all approved and it was ordered that the Writs of Certiorari be quashed and judgments were entered against your Petitioners (R. 12-16).

An appeal was taken to the Supreme Court of Illinois, and its opinion appears on pages 29 to 35 in this Record.

The Stipulation constitutes by its own provisions the complete record of the proceedings (R. 9).

Specifications of Errors to Be Urged.

The judgments of the Supreme Court of Illinois should be reversed because they are based upon Section 2(e) (5) of the Illinois Unemployment Compensation Act, which violates Section 1, Article 14 of the Amendments of the Constitution of the United States in two respects: First, in that it provides for the taxation of a group of employing units collectively where individually none of them would be subject to taxation, the only basis for their liability as a group being that they are owned or controlled by the same interests by *legally enforcible means or otherwise.* The stipulation shows that O. V. McGrew while owning a majority of the capital stock of the petitioning corporations did not own all of the capital stock of each of the petitioning corporations but only a majority, and, therefore, the corporations must be held liable if at all under the stipulation where it is agreed that he controls the petitioning corporations by "legally enforceable means or otherwise." Secondly, the statutory provision in question is obnoxious to Section 1, Article 14, of the Amendments of the United States Constitution because the provision is arbitrary, unreasonable, denies the Petitioners the equal protection of the laws, and the decision of the Court below sustaining the provision, results in the taking of the property of the Petitioners without due process of law regardless of the nature of the control, whether by "legally enforceable means or otherwise."

ARGUMENT.

I.

The affiliate provision of the Illinois Unemployment Compensation Act, being Section 2(e)(5) thereof (Ill. Rev. Stat. 1943, Chap. 48, par. 218) violates Section 1 of Article 14 of the Amendments of the United States Constitution, insofar as it purports to bring together for taxation purposes employing units (which singly are not subject to the tax) merely because they are "controlled either directly or indirectly by legally enforceable means or otherwise."

As has been pointed out heretofore all of the evidence is contained in the stipulation entered into between the parties (R. 6 to 9). From this stipulation it appears that (R. 7) not one of these Petitioners for the period in question had employed in its individual capacity a sufficient number of persons so as to become liable as employer for contributions under the appropriate sections of the Act. This stipulation also, however, following the words of the Statute (R. 7), provided that collectively these Petitioners together with a fifth corporation, Insul-Mastic Laboratories, Inc., if considered as a single employing unit, had in their employment a sufficient number of persons to render them liable for payments of contribution. That during the taxable period they were "controlled either directly or indirectly by legally enforceable means or otherwise" by one O. V. McGrew.

The clause governing the enforceability of the means of control is clearly contrary to public policy and is unconstitutional. It manifestly purports to cover control by means otherwise than those legally enforceable. The stipulation

fails to disclose whether or not O. V. McGrew's alleged control arises out of legal means of enforcement or is illegal in its nature. Such a stipulation would cover any situation whereby O. V. McGrew controls these Petitioners by illegal threats or any sort of fraudulent or unlawful scheme. Instances of such control may be called to mind without difficulty and need not be mentioned here whether they arise from business duress or any other type of duress or fraud.

The stipulation (R. 8) discloses that there are ten other shareholders in these corporations aside from O. V. McGrew. Some of them hold substantial interests therein, for example, in McGrew Paint & Asphalt Company, Genevieve McGrew holds 500 shares of preferred stock, and in Dednox, Inc., Joseph G. Slottow holds 25% of the capital stock. Joseph G. Slottow also holds 25% of the capital stock of the Railway Paint Company. Fred Cox holds 350 shares and V. B. McGrew holds 100 shares of the capital stock of the Insul-Mastic Roofing & Siding Company. It may be argued, although from the stipulation it does not so appear, and such assumption would not be warranted from the Record, that the actual control of O. V. McGrew is by acquiescence of the other shareholders. This type of control is too vague, indefinite and unreasonable to form the basis for any legal concept upon which to base an assessment.

The record refutes the possibility that ownership is the basis of control. O. V. McGrew's ownership varied in all of these corporations. For example, he owned 55% of the capital stock of the Railway Paint Company, but he also owned 4,998 shares of the common stock out of a total issue of 5000 in the McGrew Paint & Asphalt Company. In the Insul-Mastic Roofing & Siding Co., he owned 547 shares of the capital stock out of a total issue of 1000 shares.

In discussing a somewhat analogous situation arising out of the problem of consolidated returns of affiliated corporations under the Federal Statute (40 Stat. at L. 1081, Chap. 18, Par. 240(b)), this Court indicated in *Handy & Harmon* v. *Burnet*, 284 U. S. 136, at page 140, that assuming that there was actual control of the corporations there involved to distinguish it from legal control, affiliation would make for inequality unless the beneficial owners have substantially all of the stock of each of the said corporations. The Court there held that control without legally enforceable means could mean without title, beneficial ownership or legal means to enforce it. That control resting solely on acquiescence, the exigencies of business or other considerations having no binding force are not sufficient to satisfy the statute. The Supreme Court of the United States in this last mentioned opinion construed the Federal Statute to cover a situation where legal control only was involved, but it is clear from its opinion that any other type of control could not legally furnish a basis for a consolidated tax of the corporations.

That ownership of a majority of the stock in the corporations could not form the basis of the judgments below is clear from the opinion of the Court and from the stipulation which is not based upon ownership but on control "by legally enforceable means or otherwise" and under this stipulation no presumption may be indulged in to the effect that the control was legally enforceable and not otherwise.

The general principles as to the constitutionality or unconstitutionality under Section 1 of the 14th Amendment, have been so frequently discussed that it is not deemed necessary to enlarge on them at length in this brief. As

was stated in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, at page 689:

> "What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' "

The Court further said, page 690:

> "The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * *' "

In *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, this Court said at pages 990, 991, concerning a Statute of the State of Virginia, exempting the burden of an income tax from certain corporations and under certain circumstances:

> "It is unnecessary to say that the 'equal protection of the laws' required by the 14th Amendment does not

prevent the states from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

II.

Aside from the clause "by legally enforceable means or otherwise", Section 2(e)(5) of the Illinois Unemployment Compensation Act is as a whole obnoxious to the provisions of Section 1, Article 14 of the Amendments of the Constitution of the United States.

We come now to the question as to whether or not even if the control is by legally enforceable means the affiliate provision above referred of the Illinois Unemployment Compensation Act is constitutional. It is the contention of these Petitioners that it is not constitutional, that it violates the equal protection of the laws and deprives them of their property without due process of law. The stipulation (R. 8) shows that the minority stockholders in these corporations do not hold a nominal number of shares but very substantial interests therein, for example, in the McGrew Paint & Asphalt Co., one minority shareholder owns all of the 500 shares of preferred stock. In Dednox, Inc. and in Railway Paint Company, the minority shareholders hold 45% of the capital stock. In Insul-Mastic Roofing & Siding Company, they hold 453 shares out of a total issue of 1000 shares of the capital stock. These minority shareholders and the corporations in which they hold their stock are penalized by the judgment below on this Record, merely

because O. V. McGrew owns a majority of the shares of stock of other corporations.

In the case of *Independent Gasoline Co.* v. *Bureau of Unemp. Comp.*, 190 Ga. 613, 10 S. E. (2d) 58, the Court said at page 616:

> "But it is contended that the legislature was authorized to place this defendant in a classification different from similar corporations and individuals, because of the fact that the owner of a majority of its stock owns a majority of the stock of another corporation, and that the two corporations are controlled by the same interests. This reasoning ignores the fact that this defendant is utterly powerless to determine who shall own its capital stock, or to fashion the business transactions and conduct of its stockholders. Since these are matters beyond the control of the corporation, they do not constitute a basis justifying the classification; and a classification must be reasonable and have a fair and substantial relation to the object of the legislation."

This Court has denied certiorari in this case. (See *Bureau of Unemp. Comp., Petitioner,* v. *Independent Gasoline Co.*, 311 U. S. 707.)

In the case of *Benner-Coryell Lumber Co.* v. *Indiana Unemployment Comp. Board,* 218 Ind. 20, 29 N. E. (2d) 776, the Court said at page 780:

> "Over the sale and transfer of its stock, a corporation ordinarily has no control. Transactions relating to the sale of capital issues may be negotiated privately or through independent marketing agencies, and the responsible officers of a corporation may not be advised as to the ownership of its shares until the certificates therefor are presented for transfer. The stock of a particular corporation may be so distributed that the controlling majority thereof may change ownership at frequent intervals. In practical operation, situations may arise where the majority of the voting stock may or may not be in the hands of the same interests many

times between annual meetings of the stockholders, or even between the tax paying periods. Under such circumstances, uncertainty and confusion would be inevitable and a continuity of policy impossible. For these reasons, it seems impossible to justify the interpretation sought by the state, upon the theory that the holders of a majority of the stock have control thereof because it is within their power to dictate who the directors shall be."

This Court has also denied Certiorari in the Indiana case (see *Indiana Unemployment Comp. Board, Petitioner*, v. *Benner-Coryell Lumber Co.*, 312 U. S. 698). It needs little further argument to indicate that the Illinois Statute is arbitrary and oppressive. It is discriminatory against the Petitioners, who, individually, would be exempt from the tax. It is also discriminatory against the minority stockholders of these corporations. It is admitted in the stipulation (R. 8, Par. 4) that there is no evidence that the corporations were incorporated or formed for the purpose of evading the payment of the tax, except for the facts contained in the stipulation. There never could have been such a contention because the corporations were all in existence before the enactment of the statute complained of.

Conclusion.

It is, therefore, respectfully submitted that the application herein for the Writs of Certiorari to the Supreme Court of Illinois be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

McGREW PAINT AND ASPHALT CO.,
Petitioner,

No. 756. *vs.*

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

RAILWAY PAINT CO.,
Petitioner,

No. 757. *vs.*

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

DEDNOX, INC.,
Petitioner,

No. 758. *vs.*

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

INSUL-MASTIC ROOFING & SIDING CO.,
Petitioner,

No. 759. *vs.*

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

WRITS OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

ANSWER OF RESPONDENT TO PETITION FOR WRITS OF CERTIORARI.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
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Of Counsel.

THE DARNELL-TORRENCE PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

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McGREW PAINT AND ASPHALT CO.,
Petitioner,
No. 756. *vs.*
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RAILWAY PAINT CO.,
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Petitioner,
No. 759. *vs.*
FRANCIS B. MURPHY, DIRECTOR OF LABOR.

WRITS OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

ANSWER OF RESPONDENT TO PETITION FOR WRITS OF CERTIORARI.

The respondent for this, his answer to the petition for writs of certiorari in the premises, says that, for the reasons and upon the considerations suggested in the brief accompanying this answer, the said petition for writs of certiorari should be denied.

FRANCIS B. MURPHY,
Director of Labor.
By: GEORGE F. BARRETT,
Attorney General of the State of Illinois.

STATEMENT OF THE CASE.

The Illinois Unemployment Compensation Act sets up a comprehensive plan for providing unemployment benefits for workers employed within the State by employers designated by the Act. These employers include all who employ six or more workers within twenty or more weeks in the year (eight or more workers prior to 1940), except those engaged in certain specified employments.

The Act imposes on employers who come within its scope the obligation to pay a certain percentage of their pay rolls into the State unemployment trust fund. Benefits are payable from the fund to the employees covered by the Act, in the event of their unemployment, upon prescribed conditions and at prescribed rates.

In order to prevent evasion of the law by dividing a business having the required number of workers to bring it within the statute into smaller units, each having less than the minimum number of workers (R. 33), the Illinois Legislature originally in 1937 incorporated into the Unemployment Compensation Act the provision which is now being attacked by the petitioners. This provision, more commonly referred to as the "affiliation provision," is as follows:

> "'Employer' means:
>
> "Any employing unit which, together with one or more other employing units, is owned or controlled, directly or indirectly, by the same interests, or which owns or controls one or more other employing units, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection;" (Ch. 48, Par. 218(e)(4), P. 1610, Ill. Rev. Stat. 1937.)

The above section was amended on May 24, 1939 to read as follows:

> "'Employer' means:
>
> "Any employing unit which, together with one or more other employing units, is owned or controlled, directly or indirectly, by legally enforceable means or otherwise, by the same interests, or which owns or controls one or more other employing units directly or indirectly, by legally enforceable means or otherwise, and which, if treated as a single unit with such other employing units or interests or both, would be an employer under paragraph (1) of this subsection." (Ch. 48, Par. 218(e)(5), P. 1614, Ill. Rev. Stat. 1939.)

The necessity for the above provision has been recognized not only in Illinois but also in many other parts of the country. Twenty-two other States now have a similar provision in their unemployment compensation laws.[1] Eight States have no need of an affiliation provision, since their unemployment compensation laws impose liability on employers with a minimum of one worker or very few workers.[2] Three States formerly contained an affiliation provision in their unemployment compensation acts but deleted it when their laws were amended so as to practically include all employers regardless of the number of their workers.[3]

The question sought to be presented.

The question raised by petitioners herein is whether the above affiliation provision in the Illinois Unemployment Compensation Act infringes the due process and equal protection clauses of the Fourteenth Amendment.

1. Arizona, Delaware, Florida, Georgia, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas and West Virginia.

2. Arkansas, California, Montana, Nevada, Ohio, Oregon, Pennsylvania and Wyoming.

3. Idaho, Utah and Washington.

ARGUMENT.

I.

Certiorari should be denied since no substantial Federal question is involved.

The question raised by petitioners has already been foreclosed by prior decisions of this Court so as to leave no room for real controversy.

In *Mississippi Unemp. Comp. Comm.* v. *Avent*, 192 Miss. 85, 4 S. (2) 296, 684, it was contended that certain provisions of the Mississippi Unemployment Compensation Act **identical with the provisions of the Illinois Unemployment Compensation Act herein attacked**, deprived the appellee of property without due process of law and denied him the equal protection of the law contrary to the State and Federal constitutions. The Supreme Court of Mississippi held that such provisions were not violative of either the State or Federal constitutions.

An appeal was taken to this Court, which dismissed the appeal **for want of a substantial Federal question.** *Avent* v. *Mississippi Unemp. Comp. Comm.*, 316 U. S. 641; 62 S. Ct. 947. In dismissing the appeal, this Court cited the following cases: *Carmichael* v. *Southern Coal Company*, 301 U. S. 495, 510-513; *Great A. & P. Company* v. *Grosjean*, 301 U. S. 412; *H. E. Butt Grocery Company* v. *Sheppard*, 311 U. S. 608; *Helvering* v. *Clifford*, 309 U. S. 331.

Carmichael v *Southern Coal Company*, *supra*, involved the general constitutionality of the Alabama Unemployment Compensation Act. The said Act at that time contained the following provision:

"* * * Where a person, partnership, associa-

tion, corporation, whether domestic or foreign, or the legal representative, trustee in bankruptcy, receiver, or trustee thereof, or the legal representative of a deceased person, either directly or through a holding company or otherwise has a majority control or ownership of otherwise separate business enterprises employing persons in the state, all such enterprises shall be treated as a single 'employer' for the purposes of this act. * * *" (The Unemployment Compensation Act, Ala. Acts 1935, Sec. 2(f), P. 952; Ala. Code of 1928, 1936 Cum. Supp., Par. 7597.)

This Court, while not specifically discussing such provision, held that the Alabama Unemployment Compensation Act, as a whole, was not subject to any constitutional infirmity.

In *Great A. & P. Company* v. *Grosjean, supra*, this Court upheld the constitutionality of a State chain store tax act which provided that the tax "shall be based on the number of stores or mercantile establishments included under the same general management, supervision or control."

The *Butt Grocery* case, *supra*, involved an appeal from the decision of the Court of Civil Appeals, 3d Supreme Judicial District of Texas, which sustained the validity of the Texas Chain Store Act. *H. E. Butt Grocery Company* v. *Sheppard*, 137 S. W. (2d) 823, 824. The said statute provided that the "Act shall be construed to apply to every person [or] * * * corporation * * * which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management. * * *"

In its decision, the Texas Court pointed out that the law was manifestly intended to prevent large chains of stores from circumventing the tax burdens imposed under the Act, by organizing separate corporations to operate them,

the capital stock of which, or a majority of it, being owned by a parent corporation or holding company, or by an individual or association of individuals. The Court also noted that it was immaterial that the appellant corporations were organized and were operating stores separately before the Act was passed.

Upon appeal to this Court, the case was dismissed for want of a substantial federal question, the Court citing *Great A. & P. Company* v. *Grosjean, supra; Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Liggett Co.* v. *Lee*, 288 U. S. 517; *Fox* v. *Standard Oil Co.*, 294 U. S. 87. The last three cases dealt with statutes similar to the one quoted above in *Great A. & P. Company* v. *Grosjean, supra.*

In *Helvering* v. *Clifford, supra*, this Court held that a husband was properly taxed for income of property placed by him in trust for his wife, where he retained control over the trust property and the income.

Upon consideration of the authorities cited by this Court in dismissing the appeal in the *Arent* case, *supra*, it is manifest that this Court by virtue of such decisions has upheld the validity of the provision herein attacked. Although petitioners have raised a federal question, it "is one which has been so explicitly decided by this Court as to foreclose further argument on the subject and hence to cause the federal question relied upon to be devoid of any substantial foundation or merit." (*Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314.)

It should be noted that language similar to the statute in question has for many years occurred in Federal Revenue Acts and has been the subject of frequent construction and explication in the opinions of Federal courts in many decisions.

For example, Section 240(b) of the Federal Internal

Revenue Act of 1918, which required affiliated corporations to file consolidated returns, defined affiliation, declaring it to exist where "substantially all of the stock of two or more corporations is owned or controlled by the same interests." U. S. Stat. at Large, Vol. 40, P. 1082.) This section was reenacted in the Revenue Acts of 1919 and 1921. It was changed to "owned by the same interests" in the Revenue Act of 1924.

The said provisions in the Federal Revenue Acts have been given effect in the following cases: *Pokorny Realty Company* v. *U. S.*, 59 Fed. (2d) 236; *American Auto Trimming Co.* v. *Luca*, 37 Fed. (2d) 801; *Uniform Printing & Supply Company* v. *Comm.*, 33 Fed. (2d) 445 (C. C. A., 7th); *Comm.* v. *City Button Works*, 49 Fed. (2d) 705, 706; *Palmgrove Company* v. *Comm'r*, 25 Fed. (2d) 801; *Lavenstein Corporation* v. *Comm'r*, 25 Fed. (2d) 375; *J. Rogers Flannery & Company* v. *Comm.*, 42 Fed. (2d) 11; *Olds and Whipple* v. *Comm.*, 75 Fed. (2d) 272 (C. C. A., 2d, 1925); *Black Diamond Coal Co.* v. *Comm.*, 61 Fed. (2d) 573 (C. C. A., 7th, 1932); *Island Petroleum Co.* v. *Comm.*, 57 Fed. (2d) 992 (C. C. A., 4th); *Burnet Comm'r* v. *Wilshire Oil Co., Inc.*, 46 Fed. (2d) 975 (C. C. A., 9th, 1931); *Kile & Morgan Company* v. *Commissioner*, 41 Fed. (2d) 925.

The case of *Independant Gasoline Company* v. *Bureau of Unemp. Comp.*, 190 Ga. 613, 10 S. E. (2d) 58, upon which petitioners rely, represents a minority view and stands alone. It is ably discussed and disapproved of in *Washington* v. *Kitsap County Bank*, 10 Wash. (2d) 520, 117 P. (2d) 228.

As against the holding in *Independent Gasoline Company* v. *Bureau of Unemp. Comp., supra*, affiliation provisions in the unemployment compensation laws of twelve other States which are similar to the one in question have been sustained as constitutional in the following cases:

New Haven Metal and Heating Supply Co. v. *Danaher*, 128 Conn. 213, 21 A. (2d) 383; *Mt. Vernon Bank and Trust Co.* v. *Iowa Employment Security Comm.*, 11 N. W. (2d) 402; *Maine Unemp. Comp. Comm.* v. *Androscoggin, Jr., Inc.*, 137 Me. 154, 16 A. (2d) 252; *Maryland Unemp. Comp. Bd.* v. *Albrecht*, 36 A. (2d) 666; *Godsol* v. *Michigan Unemp. Comp. Comm.*, 302 Mich. 652, 5 N. W. (2d) 519; *Mississippi Unemp. Comp. Comm.* v. *Avent*, 192 Miss. 85, 4 S. (2d) 296, 684; *Kellogg* v. *Murphy*, 349 Mo. 1165, 164 S. W. (2d) 285; *Wiley Motors, Inc.* v. *Unemp. Comp. Comm.*, 130 N. J. L. 30, 31 A. (2d) 39; 131 N. J. L. 228, 35 A. (2d) 894; *Unemp. Comp. Comm.* v. *Willis*, 219 N. C. 709, 15 S. E. (2d) 4; *Gibson Products Co.* v. *Murphy*, 186 Okla. 714, 100 P. (2d) 453; *Witherspoon Oil Co.* v. *State* (Texas), 156 S. W. (2d) 579; *Washington* v. *Kitsap County Bank*, 10 Wash. (2d) 520; 117 P. (2d) 228.

It is respectfully submitted that the question raised by petitioners is clearly unsubstantial and that the petition for writs of certiorari should therefore be denied.

II.

The denial of certiorari in Bureau of Unemp. Comp. v. Independent Gasoline Company, 311 U. S. 707, relied upon by petitioners, imports no expression of opinion upon the merits of that case.

Petitioners' assert that provisions similar to the one in question have been held unconstitutional in *Independent Gasoline Company* v. *Bureau of Unemp. Comp.*, 190 Ga. 613, 10 S. E. (2d) 58 and in *Benner-Coryell Lumber Company* v. *Indiana Unemp. Comp. Board*, 218 Ind. 20, 29 N. E. (2d) 776, and that this Court has denied certiorari in both of these cases. *Bureau of Unemp. Comp.* v. *Independent Gasoline Company*, 311 U. S. 707; *Indiana Un-*

emp. Comp. Board v. *Benner-Coryell Lumber Company*, 312 U. S. 698.

A careful reading of the decision of the Supreme Court of Indiana in *Benner-Coryell Lumber Company* v. *Indiana Unemp. Comp. Board*, *supra*, clearly indicates that the statute therein attacked was *not declared* unconstitutional but that it was held inapplicable to the facts in that case. Moreover, this Court denied certiorari in the foregoing Indiana case **for want of a final judgment.** *Indiana Unemp. Comp. Board* v. *Benner-Coryell Lumber Company*, *supra.*

The denial of certiorari by this Court in *Bureau of Unemp. Comp.* v. *Independent Gasoline Company*, *supra*, imports no expression of opinion upon the merits of the case. That rule has been stated many times by this Court. *U. S.* v. *Carver*, 260 U. S. 482, 490; *Hamilton-Brown Shoe Company* v. *Wolf Brothers & Company*, 240 U. S. 251, 258; *Atlantic Coast Line R. Co.* v. *Powe*, 283 U. S. 401, 403, 404.

It should be noted that in *Bureau of Unemp. Comp.* v. *Independent Gasoline Company*, *supra*, the Supreme Court of Georgia held that the provision in question violated both the state and federal constitutions. Its decision as to the validity of the statute under the state constitution is accepted as binding by this Court. *Minnesota* v. *National Tea Company*, 309 U. S. 551, 556; *Alton R. Co.* v. *Illinois Commission*, 305 U. S. 548, 554; *Senn* v. *Tile Layers Union*, 301 U. S. 468, 477.

A decision by a state court holding a state statute invalid because repugnant to like provisions in both the federal and state constitutions rests upon adequate non-federal grounds and will not be reviewed by this Court. *Lynch* v. *New York*, 293 U. S. 52. Where an independent and adequate non-federal ground of decision appears, review may not be had in the Supreme Court of the United

States, even though the state court purports to decide a federal question and decides it erroneously. As this Court has pointed out, in such a case reversal for error in the decision of the federal question would be "useless and profitless," for the state court could thereafter enter the same judgment upon the non-federal ground alone. *Murdock* v. *Memphis*, 20 Wall. 590, 634, 635; *Enterprise Irrigation Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 164, 165.

In view of the foregoing, the reason for the denial of certiorari by this Court in *Bureau of Unemp. Comp.* v. *Independent Gasoline Company, supra*, is clear. It is respectfully submitted that such denial imports no expression of opinion upon the merits of that case.

III.

Petitioners' contention that the affiliation provision in question covers control by illegal means is devoid of merit.

Petitioners maintain that the phrase "by legally enforceable means or otherwise" as contained in the affiliation provision purports to include control by unlawful and fraudulent means. The contention is inapplicable and frivolous as is evident from the following:

First, prior to May 24, 1939, the affiliation provision in the Illinois Unemployment Compensation Act did not contain the phrase "by legally enforceable means or otherwise." (Page 2 herein.) Such phrase was added by amendment on May 24, 1939 (Page 3 herein).

The petitioners were in existence prior to that date (Petitioners' Brief P. 20) and their liability was predicated upon the provisions of the statute prior to the said amendment.

Second, the argument is based on purely gratuitous assumptions. It is without any foundation in the record and is premised upon a complete misunderstanding of the opinion rendered by the Supreme Court of Illinois in the instant case.

The Illinois Supreme Court held that both ownership *and* actual joint control were necessary to bring an employer within the scope of the affiliation provision (R. 33, 34; see also *Moriarity, Inc.* v. *Murphy*, 387 Ill. 119, 55 N. E. (2d) 281, decided by the Supreme Court of Illinois on the same day as the instant case). It found that O. V. McGrew's majority ownership of the stock in each of the petitioner corporations constituted ownership within the meaning of the statute and that the stipulation as to control was a binding stipulation of fact made for the purpose of obviating the necessity of taking proof on the question of actual joint control, evidencing a unification in the management and formation of the policies of each of the petitioner corporations. It is difficult to conceive of control being other than legally enforceable under the above circumstances.

Third, petitioners place an unreasonable construction on the phrase "by legally enforceable means or otherwise." Such language plainly does not sanction control by unlawful or fraudulent means. The objective of the statute does not require such a construction nor will the Court impute such an intention to the Legislature. No court which has passed upon the affiliation provision has so construed it, least of all the Supreme Court of Illinois. On the contrary, the latter has limited the application of the affiliation provision to cases where both ownership *and* control are present.

It is submitted that petitioners' contention is without merit in this regard.

CONCLUSION.

For the foregoing reasons respondent submits that the petition for writs of certiorari should be denied.

Respectfully submitted,

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FILED
JAN 15 1945
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CLERK

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REPLY OF PETITIONERS TO ANSWER OF RESPONDENT TO PETITION FOR WRITS OF CERTIORARI.

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FRANCIS B. MURPHY, DIRECTOR OF LABOR.

REPLY OF PETITIONERS TO ANSWER OF RESPONDENT TO PETITION FOR WRITS OF CERTIORARI.

It is respectfully submitted that the answer of the Respondent to the Petition for Writs of Certiorari is insufficient in several respects. They will be taken up briefly in their order.

I.

Public Policy.

In Respondent's statement of the case there is presented to the Court a discussion as to the value and meaning of the Illinois Unemployment Compensation Act. The Petitioners have not requested the Court to declare the Act to be unconstitutional as a whole. They believe that the affiliate provision in question can be condemned without destroying the purpose or intent of the Statute, and that even if the Court should hold that this provision (Section 2(e)(5) of paragraph 218 of the Illinois Statute) be generally valid, nevertheless the clause therein "by legally enforceable means or otherwise" is repugnant to the constitution and the words "or otherwise" may be eliminated as unconstitutional without disturbing the general force and effect of the Statute.

II.

The Record.

A.

The Respondent has misconceived the record. It is stated in Respondent's answer (Page 10) that the liability of the Petitioners was not predicated upon the provisions of the present Statute. The Respondent has overlooked the recitation in the report of the Director's representative (R. 4, 5) in which it clearly appears that the Director held that on June 5, 1941 the Petitioners were held liable for payment of contributions commencing in 1937 and continuing through the fourth quarter of 1940. The language of the stipulation (R. 6, 7) entered into on January 5, 1942 embodies the present Statute as amended in 1939. Neither the report of the Director's representative nor the

orders affirming the decision by the Circuit Court nor the opinion of the Supreme Court of Illinois contain any suggestion supporting the statement in Respondent's answer (Page 10), to-wit:

> "The petitioners were in existence prior to that date (Petitioners' Brief P. 20) and their liability was predicated upon the provisions of the statute prior to the said amendment."

The Supreme Court of Illinois, to the contrary, definitely based its decision on the constitutionality of the existing Statute, Section 2(e)(5) of the Illinois Unemployment Compensation Act (Ill. Rev. Stat. 1943, Chap. 48, par. 218). (See opinion of the Supreme Court of Illinois, R. 29, 33).

B.

The Respondent has misconceived the force and effect of the stipulation. It is not based upon ownership, but upon control. (R. 7, par. 2). The stipulation showed that O. V. McGrew was the owner of fifty-five per cent, or less, of the capital stock of three of the corporations (R. 8). There was no stipulation to the effect that he owned all, or substantially all, of the stock of these corporations.

III.

Handy & Harmon v. Burnet, 284 U. S. 136.

Respondent has made no attempt to explain or obviate the force of the language in this decision commented upon in Petitioners' original petition (Pages 6, 7, 16). The language of the Supreme Court commenting upon a comparable statute seems to indicate quite clearly that the provision here in question would be likewise void and inequitable.

IV.

Avent v. Mississippi Unemp. Comp. Comm. 316 U. S. 641.

The Respondent has placed great stress upon this case which dismissed an appeal from the decision of the Supreme Court of Mississippi, in *Mississippi Unemp. Comp. Comm.* v. *Avent*, 192 Miss. 85, 4 So.(2d), 294, 296, 684. An examination of the Mississippi case shows quite clearly that the Appellant in that case, Avent, had admitted that he had separated his business, giving one portion to his wife so as to avoid paying the "unemployment tax" and the Court held (4 So. (2d) 298) that the Act should be interpreted in the light of Avent's "express purpose to evade liability * * *".

There was no discussion of the constitutionality of the section in question in the original decision rendered on October 27, 1941, but on November 24, 1941 (4 So. (2d) 684), the Court held on a suggestion of error that the statute generally was not unconstitutional.

An inspection of both decisions indicates clearly that Mrs. Avent, to whom Mr. Avent had transferred a portion of the business in order to avoid the tax, was only nominally the proprietor of the severed business. The Mississippi case is clearly not in point and it is obvious why under such a factual situation there was no substantial Federal question raised.

It is, as we have pointed out in our original brief, admitted in this record that the Petitioners herein were not organized to evade the tax.

V.

Other Cases Cited by Respondent.

The case of *Carmichael* v. *Southern Coal Company*, 301 U. S. 495, sustains the validity generally of an Unemployment Compensation Statute. There is no discussion of a provision such as is before this Court in the instant case.

The case of *Great A. & P. Company* v. *Grosjean*, 301 U. S. 412 has no application, since there was involved in that case a chain store tax levied on chain stores all controlled by the same corporation.

In the case of *H. E. Butt Grocery Company* v. *Sheppard*, 311 U. S. 608, the Court dismissed an appeal from the Court of Civil Appeals of Texas for want of a substantial Federal question. This case, likewise, is not in point.

The opinion in *Helvering* v. *Clifford*, 309 U. S. 331, which was cited by this Court when it dismissed the appeal in *Avent* v. *Mississippi Unemp. Comp. Comm.*, 316 U. S. 641; 62 S. Ct. 947, indicates that the Court had in mind quite well the facts in the Mississippi case. In this case of *Helvering* v. *Clifford*, 309 U. S. 331, the question involved was whether or not the income of a short-term trust should be taxed to the settlor, the husband, rather than to the wife, the beneficiary. As in the Avent case, the transfer from one spouse to another would not avoid the tax.

VI.

Section 240 (b) of the Federal Internal Revenue Act of 1918.

This Statute (40 Stat. at Large, Vol. 40, 1081), which is largely relied upon (Respondent's answer, Pages 6, 7), is not in point because, as is shown in the case of *Handy & Harmon* v. *Burnet*, 284 U. S. 136, which we have hereto-

fore discussed, the Statute contemplated a situation where substantially all of the stock of two or more corporations was owned or controlled by the same interests.

Conclusion.

The Respondent has cited no decision in which the contentions as to the invalidity of the phrase "by legally enforceable means or otherwise" have been passed upon. The undersigned cannot find any such decision where the invalidity of this provision was raised by a litigant or commented upon by the Court. The Supreme Court of Illinois in this case likewise failed to pass upon the question.

It is respectfully submitted that Writs of Certiorari to the Supreme Court of Illinois should be granted.

Respectfully submitted,

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